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Twenty-fifth session

SUMMARY RECORD OF THE 471st MEETING

Held at Headquarters, New York,
on Wednesday, 6 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.10 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 of the draft Model Law, as set out in annex I to document A/46/17.

2. Mr. LE GUEN (France) thanked the Chairman for the explanations he had given the previous day on the background to article 17. Although aware of the dangers involved in reopening the discussion of article 17, he nevertheless felt that the article had to be improved. While it had been said that the operation of posting to an account was not a reliable criterion for determining the moment of completion of a credit transfer, article 5 did indeed rely on that criterion, and he felt that it could be used in article 17 as well.

3. Mr. CHATURVEDI (India) supported the position of France. The first sentence of article 17 (1) was inadequate, in that a credit transfer was completed only when the money actually reached the beneficiary.

4. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that European banks viewed the provisions of article 17 with disfavour, because those provisions were unnatural. Whether a transaction involved a small cash payment between individuals, or an electronic funds transfer through the banking system, it was completed only when the money was actually in the hands of the beneficiary. Article 17 (2) was particularly unnatural, in stating that "the obligation is discharged when the beneficiary's bank accepts the payment order". Under French legislation, and also under Swiss law, a credit transfer was completed only when the funds were at the disposal of the beneficiary. At the UNCITRAL session in Vienna in 1991, many countries, including Italy, Sweden, Canada, China and Finland had wanted to replace the notion of acceptance of the order with that of payment of the funds to the beneficiary. The Bank for International Settlements and the International Law Association had also had reservations with regard to article 17.

5. He had been led to believe that the real purpose of article 17 was to protect the originator against bankruptcy of the beneficiary's bank. If that were so, then it would be sufficient to specify in article 17 that a credit transfer was completed when the funds were made available to the beneficiary, on the understanding that the risk of bankruptcy of the beneficiary's bank was a risk borne by the beneficiary.

6. The Banking Federation had interviewed several large companies in France and Belgium, not one of which had agreed that a credit transfer could be regarded as completed when their own bank accepted the payment order. The eight cases defined in article 8 (1) had also engendered major uncertainty, on the grounds that it would be very difficult for the beneficiary to know when

(Mr. Vasseur)

his bank had actually accepted the order. A further question was that of the burden of proving when the order had been accepted. The Commission should not forget that the text which it was drafting was only a model law, and thus not binding on States, which could decide to accept or reject it or parts of it as they chose. He was sure that numerous States would reject article 17 as it stood.

7. The CHAIRMAN explained that his remarks the previous day had covered the main reasons for the wording of article 17, but that there were also others. However, protection of the originator against the risk of bankruptcy of the beneficiary's bank was not one of them. The intention of the article was to give a clear and objective definition of the point in time when the credit transfer was deemed to be completed, and to define who carried the burden of proof.

8. Mr. AZZIMAN (Morocco) supported the position of France and the Banking Federation.

9. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that article 17 (1) should be rewritten to state that a credit transfer was completed only when the funds were available to the beneficiary, for two reasons: firstly, internal consistency within the Model Law itself, namely consistency between articles 2 and 17, and secondly, avoidance of two different legal procedures, covering international and domestic credit transfers respectively.

10. Mr. MOORE (Nigeria) supported the view that a credit transfer was not completed until the beneficiary had received the funds.

11. Mr. SCHNEIDER (Germany) said he did not understand why there was a move to change article 17. Two different reasons had been given. On the one hand, there was the question of the underlying obligation, which could be said to have been discharged only when the beneficiary was in a position to earn interest on the funds in question.

12. On the other hand, article 17 also covered something very different, namely the moment at which the transaction itself was completed. If article 17 were changed, it would then be necessary for the Commission to return to all the other articles and check them all once more. For example, under article 13, the so-called "money-back guarantee" would continue to exist for the originator's bank, if article 17 were changed, until the money was actually in the beneficiary's account. He was sure that German banks would never agree to such a result from article 17.

13. The main point at issue could be found in article 10, the date of execution for value. He was willing to reconsider article 10, but had seen no reason so far to change article 17.

14. The CHAIRMAN agreed that to change the rule enshrined in article 17 would cause repercussions in many other articles.

15. Mr. EL-SHARKAWY (Egypt) said that the definition of the moment when a credit transfer was completed could vary according to two different hypotheses. If the intention was to define completion with respect to the beneficiary's bank, then article 17 as currently drafted was correct. If, on the other hand, the intention was to define completion with respect to the beneficiary, then it should be made clear that the transfer was not completed until the latter actually received the funds.

16. Mr. FELSENFELD (United States of America) said that article 17 (1) was part of a larger structure, consisting of many articles. There was a superficial appeal in stipulating that a credit transfer was not over until the funds reached the beneficiary, but that did not accord with standard commercial practice. The originator would normally be instructed to make a payment by sending funds to the beneficiary's bank, and would have discharged his obligations once the funds had reached that bank. That was all that could be demanded of the originator, because the relationship between the beneficiary and the beneficiary's bank was beyond the control of the originator. Article 17 (1) respected that basic principle. Some other transaction between originator and beneficiary might well be possible, but would be governed by the law of contract, and did not need to be covered by the Model Law.

17. Mr. GREGORY (United Kingdom) supported the position taken by the United States and Germany. The Commission should remember the actual purpose of the rule in article 17 (1). It was not to define when the obligation between the originator and the beneficiary was discharged (which was covered in article 17 (2)), but to define in a precise manner when a certain period came to an end. The Model Law as a whole set out the parties' responsibilities during a particular period, and article 17 (1) defined the duration of the actions involved. The Commission had decided not to deal with the relationship between the beneficiary and the beneficiary's bank, and the current drafting of article 17 (1) respected that decision. Many articles of the Model Law, such as articles 13 and 16, depended on article 17 as currently drafted, and would have to be changed if article 17 was changed. In addition, article 8 stated clear rules on when acceptance of a payment order took place, and to make a change in article 17 would call the certainty given by article 8 seriously into question.

18. He agreed, however, that within the context of article 17 (2) consideration had to be given to the question of the underlying obligation, as raised by the delegations of France and the Banking Federation.

19. Mr. JONES (United Kingdom) explained that 15 to 20 years ago, it had been relatively easy to determine exactly when money had been credited to an account, but the present speed and volume of electronic funds transfers meant that account balances were altering from minute to minute or second to

(Mr. Jones, United Kingdom)

second. Modern banks kept track of those movements by real-time computer systems, but at the end of the day each account's statement was established on the basis of its position after trading had stopped, and the instantaneous results drawn from the real-time system were discarded. That raised the question of which accounting system would be used to determine the moment at which funds were actually credited to a beneficiary's account.

20. Banks using a real-time system had two different credit limits which they applied to each account, one for the balance drawn up at the end of the day, and a different one, much higher, relating to the balance as it changed from moment to moment during the day. The fluctuations in balances could cause major problems and losses if a customer failed during the day, such as had been the case when the Bank of Credit and Commerce International had been closed down. There were additional complications if a bank was operating in different currencies and with clients in different time zones.

21. Mr. CRAWFORD (Canada) said that he fully shared the views expressed by the Chairman concerning the importance of the rule contained in article 17 (1) and the desirability of determining a clear point in time when a transfer was considered complete. He also agreed with most of the opinions expressed by the representatives of Germany and the United States of America on the matter. He had some difficulty, however, with the reasoning of the representative of Germany, which was based on the unexpressed assumption that the beneficiary would designate his bank for the purpose of receiving a transfer. The draft Model Law had established no such precondition. Indeed, as the text stood, the originator was free to designate any bank. The rule would work only if the bank was selected by the beneficiary and not by the originator of the transfer. One possible solution would be to include a definition of "beneficiary bank" modelled on the definition of "beneficiary", along the following lines: "Beneficiary bank" means the bank designated by the beneficiary to receive funds as a result of a credit transfer.

22. The CHAIRMAN wondered how, in such a case, the draft Model Law would be structured, since the designation of the beneficiary bank was provided for not in the payment order, but in the underlying relationship. He feared that the proposed solution might create another set of problems.

23. Mr. SANDOVAL (Chile) said that an international credit transfer was independent of the underlying relationship that led to such a transfer. In his view, article 17 (1) should remain unchanged since it fulfilled the Commission's objective of indicating the moment when a transfer was completed.

24. Mr. LOJENDIO (Spain) said that article 17 sought to deal simultaneously with two difficult issues, namely, the completion of a credit transfer and the discharge of the principal obligation. It was important to distinguish between those two questions. He had difficulty with the way in which the concept of completion of a transfer was reflected in paragraph (1). While that paragraph should be retained in order to forestall a reopening of other

(Mr. Lojendio, Spain)

questions on which agreement had already been reached, he did not believe that mere acceptance by a bank was sufficient to discharge the principal obligation of the originator of a transfer.

25. The CHAIRMAN said that the question currently before the Commission was that of the time of completion of the transfer. The matter of the discharge of an obligation was a separate issue which would be addressed in paragraph (2).

26. Mr. VASSEUR (Observer, Banking Federation of the European Community) pointed out that even the rapid electronic transfer of funds by coded message carried an indication of the beneficiary bank from the moment the payment order was given. He noted further that the Commission had earlier decided that the provisions of the draft Model Law would apply not only to electronic, but also to paper payments. The question of paper payments seemed to have been neglected since then.

27. The CHAIRMAN said that the rules contained in articles 6 and 8 concerning the time of transfer referred to all forms of transfer, including paper payments.

28. Mr. GREGORY (United Kingdom) said that the discussion on electronic payments had arisen because of the problems involved in determining the precise time of the completion of a transfer. No discrimination between different forms of transfer had been intended.

29. Referring to the suggestion of the representative of Canada to define "beneficiary bank" in order for the rule in paragraph (1) to be acceptable, he felt that the issue could not be dissociated from paragraph (2), which concerned the discharge of an obligation. The question, however, was not linked to the need for the Model Law to define the moment when a transfer was complete.

30. Mr. DUCHEK (Austria) agreed that paragraphs (1) and (2) should be considered together. The Commission should not interfere with the relationship between the originator and the beneficiary, and should concern itself only with the technical means of transferring the funds. In that regard, while the concept of time of completion might be feasible, it had legal consequences for the underlying transaction. He wondered whether paragraph (2) was at all necessary and whether its provisions were feasible. If the Commission felt, however, that rules were necessary to govern the underlying relationship between the originator and the beneficiary of a transfer, then he would support the proposal by the representative of France. It was unfortunate that, owing to the process of legislation followed by the Commission, such an important question had been raised at such a late stage.

31. The CHAIRMAN pointed out that the problem had not arisen at the last minute. The questions of the discharge of an obligation and the moment of completion of a credit transfer had been the subject of exhaustive discussion. The only new element was the contention that if paragraph (1) was changed, then the structure of the draft Model Law would need to be revised and new laws established to govern the relationship between a beneficiary and his bank. The Commission had addressed the difficult questions of acceptance and completion of a transfer before addressing other articles of the draft Model Law.

32. The practical difficulties encountered in the electronic and manual handling of accounts explained why articles 6 and 8 had contemplated all possibilities. The logic behind the structure of those articles was that the acceptance of an order by a beneficiary bank marked the moment of completion of the transfer.

33. Mr. LIM (Singapore) said that he shared the views just expressed by the Chairman. He wondered whether the representatives who advocated a change in the principle contained in article 17 (1) did so because of the juxtaposition of the terms "completion" and "discharging an obligation". At the Commission's previous session, the view had been expressed (A/46/17, para. 284) that some of the difficulties might be alleviated if the rule on completion were returned to its original location in article 2 (a) or, alternatively, if a reference to article 2 (a) were added to paragraph (1).

34. Ms. KOSKELO (Observer for Finland), referring to the need for a precise determination of the completion of a transfer, said that while it would be correct to rely on the time of acceptance by the beneficiary bank, she shared the view that, if the time of crediting was uncertain, then that uncertainty would affect the concept of acceptance. It had been pointed out that, under article 8, the earliest event that occurred would signify acceptance. Since crediting would be the first event, it was necessary to determine when the act of crediting was complete. While she did not object to the principle behind article 17 (1), a problem would arise if a precise time was necessary to determine the completion of a transfer. There might thus be need to further refine article 8 in order to reach a conclusion on the precise time of completion of the transfer. In that connection, she would welcome clarification from the representative of the United Kingdom on how he interpreted article 8 (1) (d).

35. While paragraphs (1) and (2) of article 17 dealt with separate problems, namely, the time of completion of a transfer and the time of discharge of an obligation, a lag between those two times could create problems for the originator, should difficulties arise for the beneficiary bank after it had accepted payment and before the discharge of the obligation. While the problems were separate, the solutions must be coordinated.

36. The suggestion that the scope of article 17 (1) should be limited to cases in which the beneficiary designated the beneficiary bank was also relevant to article 17 (2).

(Ms. Koskelo, Observer, Finland)

37. She was of the view that the first sentence of article 17 (1) should be qualified by some formulation such as "that is consistent with the originator's payment order" in order to forestall any problems in the application of articles 13 and 16, concerning liability.

38. The CHAIRMAN said that the mixing of the issues in paragraphs (1) and (2) would make it difficult to reach a conclusion. Paragraph (1) concerned the question of when a credit transfer was complete while, in paragraph (2), the Commission must decide whether to have a rule that referred to the discharge of the obligation stemming from an underlying transaction. In other words, it would have to decide whether to retain or delete paragraph (2). If it was retained, the Commission would have to decide whether discharge of the obligation would occur at the same time as or at a different time from that stipulated in paragraph (1).

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

39. Mr. LE GUEN (France) said he had the impression that some members of the Commission considered that the increasing practice of keeping accounts in real time complicated matters and made it difficult for banks to establish the exact time at which an account had been credited or debited. In his opinion, quite the opposite was true. French banks kept their clients' accounts in real time, and both the bank and the holder of the account had a much better knowledge of the transactions that had been made, and they received information about such transactions much more quickly than under previous systems. The problem referred to by the representative of the United Kingdom might therefore have its origin in the British accounting system.

40. His delegation was very interested in the pertinent comments made by the representative of Finland. It was his impression that what was understood by "acceptance" was to a large extent based on accounting practices. According to articles 6 and 8 of the draft Model Law, acceptance could take place when the bank credited or debited the account. He did not understand why the crediting or debiting of an account should be used to determine the precise time at which acceptance took place, while the same transactions could not be used to establish the precise point in time when a payment was completed.

41. Mr. BHALA (United States of America) said it was his understanding that the use of real-time systems had enabled the users of such systems to define more precisely the time at which certain transactions occurred, which included the crediting of accounts.

42. Mr. ROJANAPHAUR (Thailand) said that article 17 (1) dealt with the completion of credit transfers and must therefore be read in conjunction with article 17 (2), which dealt with the discharge of the originator's obligation. Article 17 (2) was important because, even if it could be assumed that the credit transfer as defined in article 8 had been completed, the

(Mr. Rojanaphaur, Thailand)

originator could not be considered to have discharged his obligation until the beneficiary received the full amount of the payment order in cash. His delegation could accept the text of articles 17 (1) and 17 (2) as they stood.

43. Mr. CHATURVEDI (India) said that the first sentence in article 17 (1) did not correspond with the definition of "credit transfer" as contained in article 2. According to that definition, "credit transfer" meant "one or more payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary", whereas in article 17 (1) the funds were not placed at the beneficiary's disposal. In that regard, the representative of France seemed to be suggesting that, rather than referring to the acceptance of the payment order by the beneficiary's bank, the Model Law should refer to the crediting or debiting of the account that would complete the credit transfer. Moreover, the representative of Finland had correctly observed that it was not possible to separate the concepts of completion of credit transfer and discharge of obligation.

44. He proposed that, in the first sentence of article 17 (1) the words "for the originator's bank" should be inserted after the words "a credit transfer". That would mean that the obligation of the originator's bank was discharged the moment the beneficiary's bank accepted the payment order.

45. Mr. KOMAROV (Russian Federation) said it was important to bear in mind that article 17 (1) stressed the fact that the Model Law dealt only with the relationship between banks and the originator, and not the relationship between the beneficiary's bank and the beneficiary. If the first part of article 17 (1) was deleted, the sphere of applicability of the Law would be unclear. His delegation therefore supported the proposal to leave article 17 (1) as it stood, on the understanding that it should be interpreted in the light of the provisions of other articles of the Law, in particular article 8, which defined "acceptance".

46. Mr. EWORE (Observer for Gabon) said that the concept of "completion" should not be placed in a context that favoured the bank, the beneficiary or the originator, but should take account of the situation from the standpoint of all three participants in the credit transfer. His delegation supported the comments made by the representative of France and those made by the representative of the Banking Federation.

47. The CHAIRMAN said that a number of delegations shared the concerns expressed by the representative of France, while a larger number of delegations supported the text of article 17 (1) as it stood. He suggested that those delegations that were not in favour of adopting article 17 (1) should accept it on a provisional basis in order to enable the Commission to proceed to the consideration of article 17 (2), at which time it would decide either to restrict the cases in which completion of a credit transfer meant the discharge of the underlying obligation, or would decide to delete the text dealing with completion of credit transfers.

48. Mr. LE GUEN (France) said that, before the Commission moved on to article 17 (2), it should consider the proposal made by the representative of Canada concerning article 17 (1).

49. Mr. CRAWFORD (Canada) said that his proposal had been intended to refer to draft article 17 (2), as it addressed the problems of discharge rather than completion.

50. The CHAIRMAN noted that it would in any case be necessary for the Commission to return to article 17 (1) when it had completed its consideration of article 17 (2).

51. It was his understanding that article 17 (2) did not presuppose discharge of the underlying obligation, but rather was intended to provide a rule concerning the time when the obligation was discharged. Many members of the Commission had expressed the view that the Model Law should not contain provisions regarding the discharge of the underlying obligation; if that view was accepted, it would be relatively easy to revise article 17 (2) accordingly.

52. Mr. SOUNO (Observer, International Monetary Fund) supported the Chairman's proposal to set aside article 17 (1) until the Commission had completed its consideration of article 17 (2). It seemed to him that there had been some confusion with regard to the meaning of "credit transfer" during the earlier discussion of article 17, as some representatives had been speaking in terms of the availability of funds, while the Commission had in mind the crediting and debiting of accounts, which was a quite separate matter. That confusion might continue to arise so long as article 17 (2) was retained. He was not sure, however, that the retention of article 17 (2) in the Model Law was completely necessary. The Commission's main purpose was to fill the existing legal vacuum concerning the electronic transfer of funds; he did not think it was essential to that purpose for it to go into all the situations that could arise under article 17 (2). The French representative might also feel more comfortable with the first sentence of article 17 (1) if article 17 (2) were deleted. It should be pointed out also that article 17 (1) by itself was entirely compatible with article 9 (1), while the addition of article 17 (2) might lead to some confusion between the two articles.

53. Mr. GREGORY (United Kingdom) said that the Commission's purpose was to increase certainty concerning electronic and other credit transfers. Article 17 (2) was helpful in that respect, even though it did not cover all possible situations. It was important to remember that it did not deal with the question of whether an obligation could be discharged by a credit transfer. If article 17 (2) did not exist, the originator would remain liable to pay the beneficiary even though the beneficiary had agreed to a credit transfer as an appropriate method of payment and all the steps set out in the Model Law had been taken.

(Mr. Gregory, United Kingdom)

54. The Canadian representative had raised the important question of the circumstances in which a beneficiary would be deemed to have agreed to accept payment by credit transfer. It seemed necessary to make it clear that the payment must be made to the last bank in the banking chain; he therefore suggested that the phrase "to the account indicated by the originator" in article 17 (2) should be amended to read "to the relevant bank".

55. Mr. DE BOER (Observer for the Netherlands) said he agreed that if article 17 (1) was adopted, article 17 (2) would also be necessary, as otherwise the uncertainties pointed out, for example, by the Finnish representative would remain. Article 17 (2) was also desirable for other reasons. Firstly, the interval between the time of receipt of the payment and the time of crediting was becoming smaller and smaller. Secondly, the system under which it was the moment of crediting that was decisive always seemed to require corrections; if article 17 (2) was accepted, the need for such corrections would disappear. The adoption of article 17 (2) would also be a contribution to international harmonization, as it would bring the rule into conformity with United States law; moreover, it should be relatively easy to make the change, as the rule was governed in most countries by case-law.

56. His delegation supported the suggestion that article 17 (2) should be completed, and proposed that that should be done by adding the words "unless the beneficiary has excluded payment into that account" at the end of the sentence.

The meeting rose at 1 p.m.